

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

77-4079

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X
NEW YORK STATE COMMISSION ON :
CABLE TELEVISION, :
 : Docket No. 77-4079
Petitioner, :
 :
-against- :
 :
FEDERAL COMMUNICATIONS COMMISSION, :
 :
Respondent. :
-----X

BRIEF FOR PETITIONER

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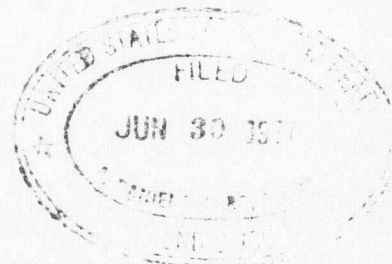


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BRIEF FOR PETITIONER

Order Below

This is a proceeding pursuant to 28 U.S.C. § 2344 to review an order of the Federal Communications Commission dated February 3, 1977 which granted reconsideration of a portion of a previous ruling, 59 FCC 2d 1344 (1976), and upon reconsideration adhered to the FCC's original ruling that certain cable television fees imposed by New York Executive Law § 817 were inconsistent with federal law.

Question Presented

Was the FCC ruling that New York's law imposing fees on cable television systems since March 31, 1972 inconsistent with FCC Rule 76.31(b), which exempts systems in operation prior to that date, correct?

Facts

Cable television systems in New York are regulated pursuant to article 28 of the Executive Law, enacted in 1972, which established a State Commission on Cable Television with responsibility to enforce construction standards (§ 820) and to prescribe standards for municipalities in issuing franchises (§ 815) and their transfer and amendment (§ 822). Other provisions empower the State Commission to regulate rates (§ 825) and abandonments of service (§ 826) as well as the reliability of service (§ 824). This act is designed to protect the consumers of New York from financially irresponsible operators as well as from excessive municipal franchise fees. The State Commission, like other State agencies regulating utilities, banks and insurance companies, imposes annual fees on the regulated industry to defray its costs and expenses (§ 817) according to a statutory formula apportioning to each company a pro rata share, up to a ceiling of 2% of the company's gross receipts. Prior to a 1975 amendment the ceiling was 1%. (See L. 1975, ch. 586, applicable to the fiscal year commencing April 1, 1975.) Section 817 took effect May 24, 1972.

Section 818 specifically authorizes municipal fees provided the sum of state and municipal fees "does not exceed the maximum amount permitted by applicable federal law, rules or regulations."

In the same year, 1972, the FCC enacted regulations dealing with cable-television fees and standards for franchises (47 CFR § 76.31). Section 76.31(b) limits franchise fees to 3% of gross subscriber revenues, and allows fees of up to 5% to be approved by the FCC if shown to be reasonable, appropriate and not interfering with federal regulatory goals. "Gross subscriber revenues" is a narrower standard than the "gross receipts" standard in the state law. The former exclude revenue from sources other than the subscriber, such as advertising and the sale of programs. The regulation adds, in the sentence at issue here:

"With respect to a cable television system that was in operation prior to March 31, 1972, the provisions of this paragraph shall not be effective until the end of a system's current franchise period, or March 31, 1977* whichever occurs first."

In 1975 the State Commission brought the proceeding here under review, requesting an FCC ruling as to whether § 817 was consistent with § 76.31(b) in a number of respects. Only one is at issue here. On June 24, 1976 the FCC ruled (A. 14):

"Section 817 * * * is not consistent with Section 76.31(b) * * * insofar as the State fee when combined with an applicable grandfathered municipal fee, exceeds 5% of total gross subscriber revenues." (Emphasis in original).

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*This date has been extended to March 31, 1978. (A.5, fn. 3)

This ruling meant that cable television systems could not be charged a fee during 1972-1977 which, when added to their municipal franchise fee, exceeded 5%. This, however, flies in the face of the language of the final sentence of the rule making it ineffective until March 31, 1977 or the end of the franchise period "[w]ith respect to a cable television system that was in operation prior to March 13, 1972." It is clearly the date when the system went into operation, not the date of the fee imposed, that governs under the FCC rule.

On August 4, 1976 the State Commission petitioned for reconsideration, pointing out the inconsistency in the FCC ruling as well as the FCC's own statements showing its consistent intent to exempt state-regulated cable systems in operation before March 31, 1972 from the rule (A. 38-39) -- especially since such "grandfathered" systems needed not even obtain FCC certification until the expiration of their franchises or March 31, 1977 (id. 40-41).

The Decision of the FCC

The FCC's declaratory ruling of February 3, 1977 (A. 17), released February 16, 1977, adhered to its previous conclusion. It quoted from the earlier decision, again incorrectly emphasizing the date of the fee, not the system, as the operative date (A. 19-20):

"[B]ecause the state fee was imposed after March 31, 1972, it is subject to the fee limitation and is not considered outside of the Section 76.31(b) limitation until March 31, 1977, as are fees imposed at an earlier date."

ARGUMENT

A.

THE DECISION OF THE FCC HOLDING ALL STATE CABLE TELEVISION FEES IMPOSED AFTER MARCH 31, 1972 TO BE PREEMPTED BY THE FCC'S RULE LIMITING FEES EXCEEDS THE TERMS OF THE FCC RULE ITSELF, WHICH EXEMPTS CABLE TELEVISION SYSTEMS IN OPERATION PRIOR TO THAT DATE, IRRESPECTIVE OF THE DATE THE FEE WAS IMPOSED.

The FCC's rule is written in plain words and should be plainly read. It limits franchise fees to 3% of gross subscriber revenues, allows fees of up to 5% where appropriate and reasonable, and goes on to exempt, or "grandfather," systems in operation prior to March 31, 1972. It exempts State laws as applied to systems, not individual fees, from its limitations.

This comports with the scheme of the regulations read as a whole, and with their history. Prior to 1972 cable television was not regulated at all by the FCC. In that year the Commission issued a Cable Television Report and Order, FCC 72-108, 36 FCC 2d 143, in which it considered and rejected federal licensing or other preemptive activity and chose instead "a deliberately structured dualism" (id. para. 177, cited in Notice of Proposed

Proposed Rule Making, Matter of Amendment of Subparts B and C of Part 76, FCC Docket No. 21002 [1976], p. 85:274)*, "with franchises issued by local authorities, but with minimum standards for those franchises set by the Commission and administered by it in the certification process" (id. p. 85:274). Local authority was expressly defined to include states (id.).

Congress too examined this matter. The Notice of Rule Making (id. p. 85:276) described its conclusions:

"Congress also has been concerned with federal-state relations in the cable franchising process. The staff of the House Commerce Committee's Communications Subcommittee issued a report in January 1976 entitled 'Cable Television: Promise versus Regulatory Performance.' Although this report considered the Commission franchise objectives generally commendable, it recommended that the Commission's minimum franchise requirements be eliminated. It asserted that the matters covered therein are not appropriate matters for federal regulation; moreover, it recommended establishment of state cable commissions which would provide for statewide licensing of cable systems but would ensure participation of local governments."

Accordingly, the FCC adopted franchise standards applicable to all cable television franchises adopted after March 31, 1972. Previously franchised systems were exempt until March 31, 1977 or the expiration of their franchises, whichever

*Hereinafter Notice of Rule Making.

occurred first (§ 76.31) / Notice of Rule Making at p. 85:276). The 1977 date was extended one year at the insistence not of the states or localities but of the cable television companies themselves (id.).

With regard to state and local fees, which the Congressional Committee Report explicitly found to be "not a matter of federal concern" (id. p. 85:280), the Commission adopted a compromise position of establishing maximum fees which states and localities might impose, basing them on a narrower base ("gross subscriber revenue") than New York uses, and exempting from federal fee control until March 31, 1978 all systems in operation on March 31, 1972.

The issue at bar arose in the course of the original proceeding brought by the New York Commission seeking adjudication of other issues, relating to the different standards for computation of fees in the FCC rules and New York statute. That point was resolved by the Commission in New York's favor (A. 12-14) and is not in issue here. However, the intervenors, New York State Cable Television Association and Manhattan Cable Television, Inc., both parties below, raised the issue of the grandfathered fees; and it was at this point that the FCC confused "systems" and "fees" and misconstrued the regulation. The rule itself provides:

"With respect to a cable television system that was in operation prior to March 31, 1972, the provisions of this paragraph shall not be effective until the end of a system's current franchise period, or March 31, 1977 [now 1978], whichever occurs first." (Emphasis supplied).

See also the FCC Cable Television Report & Order, *supra*, FCC 72-108, 36 FCC 2d 143, para. 187 ("Grandfathering"): "An existing cable system will be required to certify within five years of the effective date of these rules [1972] or on renewal of its franchise, whichever comes first, that its franchise meets the requirement of the rules. This deferral should relieve both cable systems and local authorities of whatever minor dislocations our rules might otherwise cause."

But the Commission held that as to systems with fees in excess of 5% if the state fee is included, "the imposition of the state fee in addition to the local fee would be inconsistent with § 76.31(b)" (A. 14).

This ruling flew in the face of the clear intent not to preempt, expressed both by Congress and by the FCC itself. It deprives the state and its municipalities of the resources to adequately protect the public from abuses and irresponsibility on the part of cable television operators. It does violence to the fabric of federal-state relationships in this area, violence particularly anomalous in view of the FCC's own declaration to Congress (FCC 71-787) that "we will apply generous grandfathering provisions."

B.

It is a settled principle of statutory construction that statutory language should be given its plain and ordinary meaning, particularly where the wording is unambiguous. Malat v. Riddell, 383 U.S. 569 (1966); Utilities Ins. Co. v. McBride, 315 F. 2d 553 (10th Cir., 1963); United States v. Gibbons,

331 F. Supp. 970 (D. Del., 1971); Hoover v. United States, 348 F. Supp. 502 (C.D. Calif., 1972). The same rule applies to the legislative wording of this regulation.

In Malatv. Riddell, 383 U.S. 569, 572, the Supreme Court rejected the defendants' attempt to construe the word "primarily" in § 1221 of the Internal Revenue Code of 1954. The Court held as used in § 1221(1) "primarily" meant "of first importance" or "principally" (id. at p. 572). In reaching this conclusion the Supreme Court acknowledged the preeminence of the canon of statutory interpretation that words of a statute should be interpreted in their ordinary, everyday sense. The courts have repeatedly held that there is no justification for a judicial rewriting of the statute by a federal court. Utilities Ins. Co. v. McBride, supra, 315 F. 2d 553.

The FCC's rule, written in plain words, as we have noted, should be plainly read. The portion of the regulation in issue here provides:

"With respect to a cable television system that was in operation prior to March 31, 1972, the provisions of this paragraph shall not be effective until the end of a system's current franchise period, or March 31, 1977* whichever occurs first."
47 CFR § 76.31(b). (Emphasis supplied)

*This date has been extended to March 31, 1978.

The regulation exempts State laws as applied to systems, not individual fees, from its limitations.

Reinforcement of the plain meaning of § 76.31(b) is found in the context of the remainder of that section. Section 76.31(a) sets out the standards which must be met for a cable television system (emphasis supplied) to obtain a certificate of compliance. Section (a) ends with the provision:

"Provided, however, that in an application for certificate of compliance, consistency with these requirements shall not be expected of a cable television system that was in operation prior to March 31, 1972, until the end of its current franchise period, or March 31, 1977, whichever occurs first . . ."
(Emphasis in original).

The provision goes on to include within this exemption cable television systems that while not actually in operation before March 31, 1972 had entered into binding contractual agreements prior to March 31, 1972 or had made significant financial investment prior to that date.

The provision in subsection (a) is thus almost identical to the grandfather provision in subsection (b). Yet, while both provisions refer to cable television systems in operation prior to March 31, 1972, the FCC would have "system" interpreted in the subsection (b) provision to mean "fee" in existence prior to March 31, 1972. Further, in § 76.5 (definitions), the rules define what constitutes a cable television system. Inclusion of this definition coupled with use

of the word "system" throughout § 76.31(a) and (b) shows that the rule exempts, and was meant to exempt, cable television systems in operation prior to March 31, 1972 from all provisions of § 76.31. This supports the position that the word "system" should be viewed in the context of the entire § 76.31 in light of the plain meaning rule.

As the courts have consistently held, the language of a statute or regulation should be interpreted in the light of its usual meaning and consistent with the other language therein. See United States v. Gibbons, supra, 331 F. Supp. 970, (D. Del. 1971).

The issue here is not whether reading "fee" where the regulation says "system" might possibly be acceptable, but rather whether it comports with the everyday, common-sense use of the word and the reasonable expectations of parties reading the regulation. In a case involving modification of a section of the Internal Revenue Code by a Treasury Department regulation, the court in Hoover v. United States, supra, 348 F. Supp. 502 at 505, held "statutory interpretation demands that statutory language be given its plain, obvious, and rational meaning rather than its arguably sound, but unexpressed meaning". The purpose of administrative regulations, after all, is to furnish guidance in advance to the public, to avoid the surprise and unpredictability inherent in purely case-by-case decision-making.

Words of a statute are to be given their plain and natural meaning unless manifest injustice or absurdity would result, and incorrect agency interpretations of a statute should be given little or no deference. Dobbs v. Train, 409 F. Supp. 432, 436 (N.D. Ga., 1975). Here there are compelling reasons the word "system" should be interpreted as the words themselves indicate and not as "fees," in keeping with the grandfathering of systems in operation prior to March 31, 1972, the plain purpose of the sentence in question, designed to exempt existing systems during an interim adjustment period from regulations placing ceilings on fees. The injustice or absurdity referred to in Dobbs v. Train would occur if the FCC were permitted to ignore the plain meaning of the word "system" and change "system" into "fee," thereby in effect amending its regulation without following the proper procedure outlined in the Administrative Procedure Act in order to preempt New York State's regulation of cable television. Both the Administrative Procedure Act (5U.S.C. § 533) and the FCC's own regulations relating to rule-making (47 CFR §§ 1.412, 1.413, 1.415) require at the minimum, a notice of proposed rule-making and an opportunity for interested parties to participate through submission of written data, views or arguments. The inequity of the FCC short-circuiting this procedure is highlighted by the fact that although § 76.31(a)(6) has a specific paragraph dealing with amendments of that part, § 76.31(b) contains no such reference.

The New York courts, passing upon the same regulation here involved, have found it applicable to systems, not fees. In Cerrache Television Corp.v. Kelly, 50 A D 2d 134 (3rd Dept. 1975), the petitioner company argued that Executive Law § 817 was invalid because it called for fees based on "gross annual receipts" while § 76.31(b) contemplates fees based on "gross subscriber revenues." The court held § 76.31(b) had no application to a cable television system in operation prior to March 31, 1972. This reliance by the state courts on the plain meaning of the regulation shows dramatically that the expectations of those concerned with cable television in both the public and private sectors are entitled to act based on what the FCC's regulations say as ordinary English-speaking readers perceive them.

Implicit in the FCC's almost Orwellian insistence that "systems" means "fees" is the notion that a contrary result would mean cable television systems in operation prior to March 31, 1972 would be treated differently from those systems which came in to operation after March 31, 1972. But this subverts the FCC's own professed intentions when it originally grandfathered pre-March 31, 1972 cable television systems.

In its Cable Television Report and Order, FCC 72-108, 36 FCC 2d 143 (1972), para. 187 ("Grandfathering") the FCC stated:

"An existing cable system will be required to certify within five years of the effective date of these rules [1972] or on renewal of its franchise, whichever comes first, that its franchise meets the requirement of the rules. This deferral should relieve both cable systems and local authorities of whatever minor dislocations our rules might otherwise cause."

The FCC declaratory ruling, is clearly contrary to the grandfathering policy set forth in the above report and orders. In addition adequate consideration was not given to the difficulties this ruling will cause, thereby contradicting the express policy of the FCC as enunciated in its Report and Order, supra, to avoid problems during the interim period.

If the FCC interpretation of "system" is sustained the state and the city will be faced with a dilemma as to which fee must give way in cases where the combined fee would exceed the 5% maximum level. Forcing the municipal fee to give way to the state fee will place the state in an awkward position of impairing the contracts which exist between franchise owners and the municipalities. This might well be in violation of the Contract Clause of the Constitution (Art. 1, § 10) (see City of North Las Vegas v. Central Telephone Co., 85 Nev. 620, 460 P. 2d 835 [1969]; Cuyahoga Metropolitan Housing Authority v. City of Cleveland, 342 F. Supp. 250 [D.C. Ohio, 1972], aff'd, 474 F. 2d 1102) -- a result to be avoided where possible in construing a statute or regulation. Plainly, the regulation should be construed so as to avoid any constitutional conflict. United States v. Vuitch, 402 U.S. 62 (1971); Kings Garden, Inc. v. FCC, 498 F. 2d 51 (D.C. Cir. 1974), cert. den. 419 U.S. 996.

The convoluted, unexpected construction of § 76.31(b) in cases where the combined fee will exceed 5% will in effect largely preempt state regulation of cable television, since the state Commission on cable television utilizes the fees collected from cable television systems to defray its costs and expenses (Executive Law § 817). Such a preemption would ironically, make it difficult for the FCC to enforce its own regulation. The FCC has consistently recognized the role of the states in the regulation of cable television. In 1972 when it first began regulating cable television it issued its Cable Television Report and Order, FCC 72 72-108, 36 FCC 2d 143. The FCC there considered and rejected federal licensing or other preemptive activity, and specifically recognized that state and local governments, closer to the consumers and the industry than the federal agency, have a significant role to play in this area. Further the FCC decided to adopt "a deliberately structured dualism" (id. para. 177, cited in Notice of Proposed Rule Making, Matter of Amendment of Subparts B and C of Part 76, FCC Docket No. 21002 [1976], p. 85:274), "with franchises issued by local authorities, but with minimum standards for these franchises set by the Commission and administered by it in the certification process" (id. p. 85:274). When the regulatory rule was promulgated it was specifically entitled "Federal-State/Local Regulatory Relationship."

Congress has also considered the role of the state in this area. The Notice of Proposed Rule Making (id., p. 85:276) described its conclusions:

"Congress also has been concerned with federal-state relations in the cable franchising process. The staff of the House Commerce Committee's Communications Subcommittee issued a report in January 1976 entitled 'Cable Television: Promise versus Regulatory Performance.' Although this report considered the Commission franchise objectives generally commendable it recommended that the Commission's minimum franchise requirements be eliminated. It asserted that the matters covered therein are not appropriate matters for federal regulation; moreover, it recommended establishment of state cable commissions which would provide for statewide licensing of cable systems but would ensure participation of local governments."

In light of this history the FCC's attempt now to collaterally undercut and preempt state regulation if unreasonable and should not receive judicial sanction.

The courts have noted that "the [FCC] itself has recognized the role of local authorities in granting franchises and rights of way for the cables used" in two-way non-video cable systems. See National Association of Regulatory Utility Commissioners v. FCC, 533 F. 2d 601, 614, 174 App. D.C. 374 (1976), holding such systems not preempted despite the FCC's insistence that they were. Citing § 76.31, the court there noted the "significant local role provided under the Commission's regulations," as well as "its intention to create 'a cohesive, cooperative program between federal and local authorities.'" Id., 533 F. 2d 614, n. 80.

In Executive Law § 811 the purposes of and need for state regulation are explicitly set forth: "The cable television industry is in a period of rapid growth and corporate consolidation and should proceed in accord with regional and state-wide service objectives; and, many municipalities lack the necessary resources and expertise to plan for and secure these benefits and to protect subscribers and other parties to the public interest in franchise negotiations."

The current mixed federal-state regulatory procedure in an area in which both Congress and the FCC avoided preemption, should not be complicated by sanctioning an administrative interpretation of a plain, ordinary word in a way so anti-thetical to its meaning. To tamper with the existing mechanism which has been operating effectively since the inception of state regulation would be to judicially legislate the State Commission virtually out of existence. Indeed, adherence to a plain, ordinary interpretation of "systems" is especially appropriate in view of the FCC's established intent to grandfather systems functioning prior to March 31, 1972 in order to protect state and local regulation from just this sort of impairment. The normal, plain-meaning reading of the language will avert constitutional concerns during the adjustment period which the grandfather provision was intended to create. The network of federal-state relationships in the area of cable television regulation will not be destroyed and the state will be able to continue its regulatory function, a function expressly recognized by the FCC and Congress, which the extraordinary ruling of the FCC would largely hobble without any countervailing public benefit.

CONCLUSION

THE RULING OF THE FCC SHOULD BE
ANNULLED, WITH COSTS.

Dated: New York, New York
June 27, 1977

Respectfully submitted,

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ROSE ANN BATTISTA, being duly sworn, deposes
and says that she is employed in the office of the Attorney
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State Commission Cable Television herein. On the 30th day
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Attorneys in the within entitled proceeding by depositing
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Sworn to before me this
30th day of June, 1977

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